IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

SECOND APPEAL ST.NO.5817 OF 2004

Office notes, office memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.

Court's or Judge's orders.

Shri V.M.Bhate for the Appellant.
Shri G.S.Godbole for the Respondent.

CORAM : ABHAY S.OKA, J.

DATED : 3rd Sept., 2004.

P.C.:

1. Heard the learned Counsel appearing for the parties. The Respondent is the decree holder who has obtained a decree for specific performance and possession. The decree for specific performance has been passed in favour of the Respondent on the basis of agreement dated 11th July 1972 executed by the members of Waghire family in his favour. The suit was filed for specific performance in the year 1973. Admittedly Kisan Soma Rokade purchased the suit property from the members of the Waghire family against whom the suit was pending. The suit was decreed in the year 1977. The execution proceeding was filed. The Appellant filed obstructionist application in the execution proceedings. After the application was filed by the Appellant, a reply was filed at Exh.39 by the decree holder praying for removal of obstruction. Adjudication as contemplated by Order XXI Rule 97

of the Code of Civil Procedure, 1908 was made by the trial Court after framing issues at Exh.73 in the execution proceedings. The trial Court allowed the prayer in Reply/Application at Exh.39. The trial Court held that the Appellant has acquired interest in the suit property after the decree for specific performance was passed.

2. The Appeal preferred by the Appellant has been dismissed by the Appellate Court. The learned Counsel appearing for the Appellant submitted that the Executing Court has committed an error inasmuch as the application ought to have been made under Order XXI Rule 97 by the Decree Holder for removal of obstruction. However, such application was not filed and Exh.39 was merely a reply to Application made by the Appellant. He relied upon the Judgment of the Apex Court reported in 1997(1) Mah.L.J. page 817 (Brahmdeo Choudhary v/s Rishkesh Prasad Jaiswal & anr.). He submitted that opportunity to lead evidence was not accorded by the Executing Court to the Appellant.

3. Shri Godbole, the learned Counsel appearing for the Respondent has opposed admission of the Appeal. He pointed out that the undertaking was given by the Appellant in the execution proceedings to vacate the suit property.

4. I have considered rival submissions. The law laid down by the Apex Court in Brahmdeo's case (supra) is very clear, which lays down that an adjudication has to be made under Order XXI Rule 97 of the said Code on the basis of the objection raised by a stranger to Decree including an obstructionists. Such application raising objection has been admittedly made by the Appellant and the merits of the objection have been considered by the executing Court. It is not necessary that adjudication has to be made only on the basis of Application by Decree Holder. There is no substance in the first grievance made by the Appellant.

5. The Appellate Court has observed that the opportunity of leading evidence was given to the Appellant which was not availed of and therefore, there is no merit in the second contention also.

6. The Appellant is claiming through one Kisan who has purchased the suit property from the members of Waghire family during the pendency of the suit for specific performance filed by the Respondent. The Appellant purchased a portion of the suit property from the said Kisan in the year 1980 i.e. three years after the decree was passed in favour of the Respondent. It is therefore obvious that the Appellant cannot get any right in respect of the

suit property better than the right which the Respondent has. The Appellant has purchased the property after the Decree was passed from a person who is claiming through the Judgment Debtor. There is no merit in the Second Appeal. The Second Appeal is accordingly dismissed.

7. At this stage, the learned Counsel appearing for the Appellant prays for time to vacate the suit property. The said request is opposed by the learned Counsel appearing for the Respondent. The learned Counsel for the Respondent pointed out that the Respondent has been denied the fruits of the decree which was obtained in the year 1977.

8. Considering the facts and circumstances of the case, time to vacate the suit property is granted to the Appellant till 31st December 2004 subject to the Appellant filing usual undertaking of herself and all the adult members in her family in this Court within a period of three weeks from today. The undertaking will state that within the time granted by this Court, the Appellant will remove the structure erected on the suit property. If the undertaking is not filed within the stipulated period, the decree will become executable.

Judge.